

PUBLIC ADMONISHMENT OF JUDGE BERNARD E. REVAK

The Commission on Judicial Performance orders Judge Bernard E. Revak publicly admonished pursuant to Article VI, section 18(d) of the California Constitution and rules 115 and 116 of the Rules of the Commission on Judicial Performance.

STATEMENT OF FACTS AND REASONS

Judge Revak has been a judge of the San Diego County Superior Court since October 2, 1987; his current term began in January 1995.

On February 6, 2000, Judge Revak had dinner at his home with Fourth District Court of Appeal Justice Terry O'Rourke. During the evening, Judge Revak inquired about an appeal pending before the Fourth District in *Argo v. General Dynamics*, in which a jury had awarded approximately \$100 million in compensatory and punitive damages to 98 plaintiffs. Two friends of Judge Revak had financial interests in the case; Mr. Jack Sinnott is a plaintiff in the case; Mr. Jim Doherty is married to a plaintiff in the case. According to Justice O'Rourke and Judge Revak, Justice O'Rourke stated to Judge Revak that he had recently recused from what he believed to be a related case. According to both Judge Revak and Justice O'Rourke, they did not engage in any substantive discussion of the *Argo* appeal or its merits.

The following day, Judge Revak played a round of golf with three friends, including Mr. Sinnott and Mr. Doherty. During the game, Judge Revak stated to his friends that he had been told that the *Argo* verdict and/or the punitive damages award had been reversed. Judge Revak did not identify the source of this information by name, but stated that he had had a friend from the Court of Appeal over for dinner. Judge Revak also made a statement indicating that the Court of Appeal, or the opinion writer, "didn't like [the trial judge] anyway." At no time on this date did Judge Revak state to his friends that his remarks about the *Argo* case were not true or were intended as a joke.

As of February 2000, the parties' briefing had been completed in the *Argo* appeal. Oral argument had not yet been scheduled, and thus the case had not been taken under submission by the court. Judge Revak's friends had not been apprised of any decision having been issued.

On February 8, 2000, attorney Brian Monaghan, one of the attorneys representing the plaintiffs in the *Argo* case, contacted Judge Revak by telephone and asked to meet with him about an important issue; Mr. Monaghan did not indicate that his call concerned the *Argo* case. A meeting was scheduled for the morning of February 10, 2000.

On February 9, 2000, Judge Revak played another round of golf with the friends he had played with on February 7. During the game, Judge Revak chastised Mr. Sinnott for having told Mr. Monaghan about the judge's remarks on the golf course on February 7. According to Judge

Revak, during the February 9 game he informed his friends that his comments about the appeal were a joke. Mr. Sinnott and Mr. Doherty deny they were told the comments were a joke, and assert that Judge Revak made further statements, including that when he met with Mr. Monaghan he would not tell him where the information came from, and that he thought the Court of Appeal's decision was a matter of public knowledge. Judge Revak denies making these comments.

During the afternoon of February 9, Judge Revak was informed that Mr. Monaghan had cancelled the meeting scheduled for February 10, and would instead send a letter. Judge Revak received Mr. Monaghan's letter sometime during the morning of February 10. The letter advised that Mr. Monaghan had wanted to meet with Judge Revak concerning a statement the judge had reportedly made on a golf course concerning the *Argo* case, but that he had determined to present his concerns in writing to Fourth District Presiding Justice Daniel Kremer. After receiving the letter, Judge Revak initiated a telephone conversation with Mr. Monaghan during which the judge advised that he had been joking.

During the morning and early afternoon of February 10, 2000, Judge Revak also contacted Mr. Sinnott and Mr. Doherty by telephone. The judge told them that his remarks about the appeal had been meant as a joke and asked them to convey this to Mr. Monaghan when they met with him.

On the afternoon of February 10, Mr. Sinnott and Mr. Doherty met with their attorneys and provided declarations concerning the golf course conversations. The declarations of Mr. Sinnott, Mr. Doherty and attorney Monaghan were submitted to the Fourth District Court of Appeal in support of a motion filed by the *Argo* plaintiffs on February 14. The motion requested an evidentiary hearing, the recusal of justices and the transfer of the *Argo* appeal to another court on grounds of the alleged disclosure of confidential information by Judge Revak and a member or employee of the Court of Appeal, and the alleged pre-judgment of the appeal by the court.

Justice Daniel Kremer, Presiding Justice of Division One of the Fourth District Court of Appeal, conducted an investigation of the matters alleged in the *Argo* plaintiffs' motion. Justice Kremer reviewed the appellate court's files and questioned the justices of the court. On February 17, 2000, Justice Kremer issued an order denying the *Argo* plaintiffs' motion and referring to this commission the allegation that certain statements by, and possibly to, Judge Revak constituted judicial misconduct.

The *Argo* plaintiffs filed a motion for reconsideration by the Court of Appeal, which was also denied, and a petition for review in the California Supreme Court. On April 12, 2000, the California Supreme Court entered an order transferring the *Argo* appeal to the Fifth District Court of Appeal "[i]n order to avoid even the appearance of impropriety." The Supreme Court did not hold a hearing, and denied further review of the matter. The *Argo* plaintiffs' motion, Justice Kremer's February 17, 2000 order, and the Supreme Court's order transferring the appeal were the subject of considerable publicity.

The issues before the commission are whether Judge Revak was apprised of confidential information about how the appellate court was going to rule on the *Argo* case and revealed it to his friends, and whether Judge Revak's comments, even if not revealing confidential information about the outcome of the *Argo* appeal, violated his ethical obligations as a judge.

On the issue of whether confidential information was imparted, both Justice O'Rourke and Judge Revak have testified under oath pursuant to Government Code section 68753 that their February 6 conversation did not involve any substantive information regarding the *Argo* appeal. Although these statements might be regarded as self-serving, the evidence adduced by the commission investigation is that there had not yet been a determination by the Court of Appeal as to how it would rule on the case. While the case had at one time been tentatively assigned to a three-justice panel, this assignment had been vacated when re-briefing was required. Upon completion of re-briefing, Justice O'Rourke was tentatively assigned as the authoring justice, but within days he recused himself from the case – well before his dinner with Judge Revak. Thereafter the case remained unassigned. As of February 17, 2000, when Justice Kremer denied the *Argo* plaintiffs' motion, the *Argo* appeal had not been re-assigned to an appellate panel for decision and no draft or tentative decision, bench memorandum, or analysis of the merits of the appeal had been prepared or undertaken by any Fourth District justice or law clerk, or circulated to the justices of the appellate court. The evidence that no determination of the outcome of the appeal had been made at the Court of Appeal supports the conclusion that the judges could not have discussed how the appellate court had decided to rule, and Judge Revak therefore could not have conveyed such information to his friends on the golf course.

Even though Judge Revak could not have imparted the substance of a decision that the Court of Appeal had not made, Judge Revak made remarks to his friends that purported to convey the outcome of the *Argo* appeal. Judge Revak contends that his remarks were a joke: he asserts that he spoke in what he believed was a joking manner at the time he made his remarks on February 7, and that he believed his friends understood the remarks as a joke from the beginning. Judge Revak claims he expressly stated he had been joking to Mr. Sinnott and Mr. Doherty, as well as the fourth golfer, Dr. Finlay, during the February 9 golf outing, which Dr. Finlay corroborates. Judge Revak also claims that Mr. Doherty acknowledged on February 9 that he had known on February 7 that Judge Revak was joking. However, Mr. Doherty filed a declaration in the appellate court stating that he did not believe Judge Revak's comments were a joke, as did Mr. Sinnott. Mr. Sinnott and Mr. Doherty both claim that the judge first revealed that the comments were meant to be a joke on February 10.

Judge Revak's remarks, even if a joke, constitute misconduct. In *Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, the California Supreme Court found that Judge Kennick committed conduct prejudicial to the administration of justice when he engaged in a conversation with a cocktail waitress concerning her recent arrest for drunk driving, and implied that she should not worry about the arrest. The judge testified before the commission that the comments were in the nature of general reassurance that "it is going to be all right; these things have a way of working themselves out" and were not intended to imply that he would use any improper influence in the matter. While not finding that the judge had implied that he could in

some manner exert influence to affect the disposition of the case, the Supreme Court found the judge's comments to be prejudicial conduct, explaining that: "for a judge to give a layperson assurances about the outcome of a prosecution against the latter may imply inside information and thus be inappropriate." (*Kennick v. Commission on Judicial Performance, supra*, 50 Cal.3d at 332-333.)

In this matter, Judge Revak's comments to Mr. Sinnott and Mr. Doherty were misconduct for the same reason set forth in *Kennick*. Judge Revak's comments purported to convey to his friends the outcome of a court case in which they were involved and in which no decision had been announced by the appellate court. Even if intended as a joke, the comments implied to laypersons involved in a pending case that the judge was conveying inside information. Indeed, the implication was apparently so strong in the minds of Judge Revak's friends that they did not believe the judge when he later told them the comments were only a joke. The comments were improper.

The potential harm to public confidence in the integrity and impartiality of the judiciary was fully realized in the impact of Judge Revak's conduct on the parties to the *Argo* case and on the courts. As a result of the judge's conduct, the *Argo* plaintiffs filed two motions with the Fourth District Court of Appeal seeking an evidentiary hearing, the recusal of justices, and the transfer of the case to another court on grounds that Judge Revak's comments made it appear that the Fourth District had prejudged the appeal. After these motions were denied, the California Supreme Court ordered the appeal transferred to another district of the Court of Appeal "to avoid even the appearance of impropriety." As noted, Judge Revak's comments, and the *Argo* plaintiffs' motions and their aftermath resulted in substantial publicity adverse to public confidence in the judiciary.

Judge Revak's conduct implicates various provisions of the California Code of Judicial Ethics. Canon 3B(9) provides that "[a] judge shall not . . . make any nonpublic comment that might substantially interfere with a fair trial or hearing. . . ." Canon 2A provides that "[a] judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . ." Canon 1 provides that "a judge shall uphold the integrity and independence of the judiciary." Judge Revak's conduct constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute. (California Constitution, Article VI, section 18(d); see *Kennick v. Commission on Judicial Performance, supra*, 50 Cal.3d at 332-333.)

In reaching its decision, the commission noted that Judge Revak has forthrightly admitted that his conduct was the result of an unfortunate lapse of judgment, and acknowledged that it impaired the perception of the *Argo* plaintiffs and their counsel of the fairness of the appellate process and caused the courts and judiciary to suffer embarrassing and damaging publicity. After the Supreme Court transferred the case from the Fourth District Court of Appeal, Judge Revak publicly acknowledged his responsibility for the comments and apologized for the damage they caused, particularly to the Court of Appeal and to Justice O'Rourke.

Commission members Justice Daniel M. Hanlon, Mr. Michael A. Kahn, Ms. Lara Bergthold, Judge Madeleine I. Flier, Ms. Gayle Gutierrez, Mr. Patrick M. Kelly, Mrs. Crystal Lui, Judge Rise Jones Pichon, and Ms. Ramona Ripston voted to impose a public admonishment. Commission member Mr. Mike Farrell did not participate in this matter. There is currently one public member vacancy.

This decision and order shall constitute the order of public admonishment.

Dated: December____, 2000

Honorable Daniel M. Hanlon
Chairperson